STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TIMOTHY HENAULT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-3838
	)	
CITY OF PINELLAS PARK,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

On February 5 and 6, 2002, a formal administrative hearing in this case was held in St. Petersburg, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. Robert McCormack, Esquire
Persante & McCormack, P.A.
2555 Enterprise Road, Unit 15
Clearwater, Florida 33763

For Respondent: Deborah S. Crumbley, Esquire
Thompson, Sizemore & Gonzalez, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in the case is whether the Respondent's suspension and eventual termination of the Petitioner from employment were in retaliation for complaints of sexual harassment made by the Petitioner against a co-worker.

PRELIMINARY STATEMENT

Timothy Henault (Petitioner) filed a complaint of retaliation by the City of Pinellas Park (Respondent) with the Human Relations Division of the City of St. Petersburg, which conducted an investigation and then forwarded the matter to the Division of Administrative Hearings for formal hearing.

During the formal hearing, the Petitioner testified on his own behalf, presented the testimony of two witnesses, and had Exhibits numbered 1, 5-7, 10, 12-13, 15, and 19-20 admitted into evidence. The Respondent presented the testimony of seven witnesses and had Exhibits numbered 1-7, 7A, 9-12, 14-19, 21-22, and 24 admitted into evidence. One Joint Exhibit was also admitted into evidence.

A Transcript of the hearing was filed on March 11, 2002. Both parties filed Proposed Recommended Orders, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner began employment with the Respondent in October 1990 as an Automotive Service Worker in the maintenance department. At various times during his employment, there were between nine and eleven employees in the maintenance department. The Petitioner's responsibilities included mechanical work on the Respondent's police vehicles.

2. At all times material to this case, the Petitioner's immediate supervisor was Chris Marinari. Ben Lacy, the Maintenance Division Director, supervised Mr. Marinari.

3. At all times material to this case, Benjamin Lanahan was employed in the maintenance department and worked at the same facility as the Petitioner.

4. Mr. Lanahan occasionally exhibited inappropriate behavior around the mechanic's shop, including exposing his sexual organs to co-workers and grabbing at their groins or buttocks. Mr. Lanahan exhibited such behavior in the presence of, and towards, the Petitioner.

5. The Petitioner was offended by the behavior and on several occasions told Mr. Marinari of his objection to the behavior. Mr. Marinari apparently regarded the conduct as mutual "horseplay" and although he may have verbally instructed Mr. Lanahan to refrain from the behavior, he took no official action on Petitioner’s verbal complaints.

6. The Petitioner received periodic evaluations throughout his employment. The Petitioner did not note his concern about Mr. Lanahan's behavior in the employee comment section of the evaluation form, but noted his apparent increasing satisfaction with the workplace.

7. On April 15, 1992, the Petitioner was promoted to Auto Mechanic I. On December 8, 1993, the Petitioner was promoted to Auto Mechanic II.

8. There is no evidence that the Petitioner filed any written complaints with his employer regarding Mr. Lanahan's behavior prior to his termination from employment.

9. In May 1995, the Petitioner apparently became dissatisfied with Mr. Marinari’s response to his complaints about Mr. Lanahan’s behavior and took his complaint to Mr. Lacy.

10. The Petitioner asserts that Mr. Lacy threatened to terminate his employment if he "made waves." Mr. Lacy denies that he threatened the Petitioner's employment.

11. The Respondent's sexual harassment policy authorizes an employee to contact the Director of Human Resources if an employee believes that a supervisor has not adequately addressed a complaint. The Petitioner received a copy of the policy as set forth in the personnel rules.

12. The Petitioner did not report the alleged threat by Mr. Lacy until 1996, when Mr. Lacy recommended to the City Manager that the Petitioner's employment be terminated for the reasons addressed herein. The greater weight of the evidence fails to establish that Mr. Lacy made the alleged threat to

terminate the Petitioner's employment based on the complaint of harassment.

13. Mr. Lacy investigated the Petitioner’s complaint and, determining it to be valid, issued a written disciplinary report against Mr. Lanahan in June 1995.

14. Mr. Lacy and the Respondent’s Director of Human Resources recommended to the city manager that Mr. Lanahan’s employment should be terminated. The city manager did not accept the recommendation, and instead suspended Mr. Lanahan for two weeks without pay and required him to go to counseling.

15. The Respondent also offered counseling to employees at the facility who had been subjected to Mr. Lanahan’s behavior.

16. In August 1995, the Petitioner realized that, when attempting to cash a check, his driver's license had expired. He advised Mr. Marinari, who told him to take emergency vacation time to renew his license. The Petitioner renewed his license.

17. Driving a city vehicle without a valid license is a "Group II" violation of the Respondent's personnel rules, and warrants a seven-day suspension without pay. The Petitioner received the suspension. He did not file a grievance at that time.

18. The Petitioner eventually learned that some city government employees who worked in other departments and were found to be driving with invalid licenses apparently received lesser penalties for the infraction.

19. The Petitioner then filed a grievance regarding his suspension, but the filing deadline had passed and it was dismissed. The Petitioner’s grievance did not raise the alleged threat by Mr. Lacy to terminate his employment for complaining about Mr. Lanahan.

20. There is no evidence that the Petitioner's supervisors were aware of what other supervisors were doing at the time they suspended the Petitioner for driving without a valid driver's license. There is no evidence that the Petitioner’s suspension was related in any way to his complaint regarding Mr. Lanahan’s behavior.

21. The Petitioner suggests that the Respondent, which maintained a database of relevant information in order to remind employees of license expiration dates, inaccurately informed him that his license was valid when it had expired. The evidence establishes that the Petitioner provided the inaccurate database information to the Respondent. There is no evidence that the Respondent knew or should have known that the Petitioner's license had expired.

22. In September 1995, the Petitioner asked to be placed on "flextime" so that he could leave work early in the afternoon and pick up a child from school. Initially his request was denied because there were already two other employees working flextime, and the supervisor was concerned about the small shop not being fully staffed at normal hours. Within a few days, one of the other employees was returned to a regular work schedule and arrangements were made to allow the Petitioner to work a flexible schedule from 6:30 a.m. to 3:00 p.m.

23. At the time the flextime request was approved, the Petitioner was advised that because he would start his workday an hour before the maintenance shop was otherwise staffed or supervised, it was necessary that he remain on task in order to complete work assignments.

24. At some point around this time, the Petitioner found a piece of city equipment (an “A/C leak detector”) under the seat of his truck. He complained to Mr. Marinari, who questioned the Petitioner’s co-workers but was unable to determine how the equipment came to be in the Petitioner’s truck. There was no disciplinary consequence to the incident.

25. During the time the Petitioner worked a flex schedule, the building maintenance supervisor also arrived for work at about 6:30 a.m. The building manager became aware

that the Petitioner and the other co-worker on flextime would routinely leave the shop in a city vehicle shortly after arriving and “punching the clock” at 6:30 a.m.

26. The building manager reported the practice to Mr. Marinari, who in turn told Mr. Lacy.

27. On January 12, 1996, Mr. Marinari and Mr. Lacy arrived at the shop early enough to precede the Petitioner, and waited to see what would happen. The supervisors observed the Petitioner and the other co-worker arrive at about 6:30 a.m., clock in, almost immediately leave in a city vehicle, and then return with food at about 7:00 a.m. and eat breakfast.

28. While the Petitioner and the co-worker went to get breakfast, the maintenance shop was unattended and unsecured.

29. Prior to January 12, 1996, the supervisors were unaware that the flextime employees were taking a city vehicle to get breakfast while being "punched in" on the time clock.

30. The Petitioner asserts that leaving work in a city vehicle for breakfast was a common practice. The evidence fails to support the assertion.

31. The supervisors confronted the employees at the time the practice was discovered.

32. Both employees were subsequently disciplined for the incident. The co-worker was suspended for a period of seven days without pay.

33. Because the Petitioner had committed two "Group II" offenses within an eighteen-month period, Mr. Lacy recommended to the City Manager that the Petitioner's employment be terminated. The City Manager declined to follow the recommendation and instead suspended the Petitioner for a period of thirty days without pay.

34. During the thirty-day suspension period, Mr. Marinari learned that the Petitioner had a statue in his backyard that was presumed to be city property. The source of Mr. Marinari's information is unclear.

35. Mr. Marinari advised Mr. Lacy of the matter. Mr. Lacy investigated the report by driving by the Petitioner's house with the director of the city parks department, where they determined that the statue was similar to one kept at a city storage area. The matter was referred to the city police department.

36. After investigation, a police investigator determined that the statue was city property. The investigator attempted to discuss the matter with the Petitioner, who suggested other city employees had placed it there at some earlier time.

37. The Petitioner declined to identify the individuals he believed were responsible, and asserted that the whole incident was a conspiracy by people trying to "get him." The evidence fails to establish that other city employees placed the statue in the Petitioner's backyard.

38. The statue was in the Petitioner’s possession for an undetermined period of time. There is no evidence to suggest that someone involved in a “conspiracy” to have the Petitioner’s employment terminated placed the statue in his yard.

39. There is no evidence that the Petitioner reported to law enforcement officials the initial appearance of the statue in his yard. There is no evidence that the Petitioner attempted to identify or return the statue to the owner.

40. The Petitioner asserts that the police investigator suggested that the Petitioner should resign to avoid prosecution for possession of stolen city property. The investigator denies the assertion. The greater weight of the evidence fails to support the assertion.

41. Misuse of city property is a "Group III" offense, and pursuant to the personnel rules, is punishable by termination of employment. The supervisor recommended termination to the city manager. The Petitioner was suspended for five days pending an administrative hearing. Subsequent

to the hearing, the city manager accepted the recommendation and terminated the Petitioner's employment effective February 6, 1996.

42. There is no credible evidence that the termination of the Petitioner’s employment was a result of his complaints about Mr. Lanahan’s behavior.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding.

44. This case was filed pursuant to Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. 2000, et. sec.), Pinellas County Code Chapter 70, and an Interlocal Agreement between Pinellas County and the City of Pinellas Park.

45. In this case, the Petitioner asserts that disciplinary actions taken by the Respondent against him are in retaliation for his complaints about a co-worker’s inappropriate workplace behavior.

46. The standard of proof in an alleged case of retaliation depends on the nature of the evidence. Where there is direct evidence of retaliation against an employee for participation in activities sanctioned by law or based on a complaint regarding prohibited practices, the Petitioner

must prove by a preponderance of that evidence that his activities were a significant factor in the termination decision by the company.

47. Where, as is the case here, there is no direct evidence, the Petitioner must establish a prima facie case for retaliation under the shifting burden analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, (1981).

48. In order to establish a prima facie case of retaliation, the Petitioner must prove (1) that he was engaged in a protected activity; (2) that an adverse participation and the protected activity and the adverse employment action occurred; and (3) that there was a causal connection between his participation and the protected activity and the adverse employment action. Tipton v. Canadian Imperial Bank, 872 F.2d 1491 (11th Cir. 1989); Simmons v. Camden County Board of Education, 757 F.2d 1187 (11th Cir. 1985).

49. If a prima facie case of retaliation is established, the Respondent must articulate a valid, non-discriminatory reason for its decision to terminate the Petitioner. If the Respondent is able to do so, the burden of proof shifts back to the Petitioner, to show that the Respondent's articulated

non-discriminatory reason is "pretextual" and to sustain his ultimate burden of persuasion of retaliatory intent.

50. In this case, the evidence fails to establish a prima facie case of retaliation by the Respondent against the Petitioner. There is no credible evidence that the Petitioner's termination was causally related to his complaints. The mere sequence of events is insufficient to establish a prima facie case of retaliation.

51. Even assuming that such causal relation had been established, the Respondent has articulated valid reasons for termination of the Petitioner's employment. The incidents set forth herein are sufficient to warrant the disciplinary actions of which the Petitioner now complains.

52. As to the termination, the Petitioner's refusal to provide information to the police investigator regarding the manner in which the city statue came in his possession warranted termination. There is no credible evidence that the termination of employment was related in any manner to the Petitioner's complaints about Mr. Lanahan's behavior.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Human Relations Division, City of St. Petersburg, enter a final order dismissing the complaint

of employment retaliation filed by Timothy Henault against the City of Pinellas Park.

DONE AND ENTERED this 1st day of May, 2002, in Tallahassee, Leon County, Florida.

_____
WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of May, 2002.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.